

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 96-22-P-C
)	(Civil No. 97-288-P-C)
DAVID L. FISHER,)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

David L. Fisher moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 120 months was imposed after his plea of guilty to one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1), and one count of carrying a firearm in relation to a drug trafficking case, in violation of 18 U.S.C. § 924(c). Judgment (Docket No. 15). Fisher, appearing *pro se*, contends that he was deprived of the effective assistance of counsel when he entered his plea.

A section 2255 motion may be dismissed without an evidentiary hearing if the “allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because ‘they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.’” *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted). In this instance, I find that Fisher’s allegations, accepted as true, would not entitle him to relief. Accordingly, I recommend that the motion be denied without an evidentiary hearing.

I. Background

On June 27, 1996 Fisher entered a plea of guilty to two counts of an indictment, Docket No. 4, charging him with possession with intent to distribute cocaine base and using and carrying a firearm in relation to that drug trafficking crime, Transcript of Proceedings (Docket No. 20) (“Plea Tr.”) at 2-3. In determining sentencing, the court found that Fisher’s criminal history category under the United States Sentencing Commission Guidelines was Category I and that the applicable guideline range was 60 to 71 months on the first count and 60 months on the second count, to be served consecutively. Judgment at 2, 6. The court imposed a total sentence of 120 months. *Id.* at 2.

At the change-of-plea hearing, the court asked Fisher whether he had had an adequate opportunity to discuss the charges with his attorney, Plea Tr. at 6, whether he had in fact done so, *id.* at 7, whether the elements of the offenses and the penalties that could be imposed had been explained to him by his attorney, *id.*, and whether he understood that if he went to trial the government would have to prove him guilty of each offense beyond a reasonable doubt, *id.* at 8. Fisher responded affirmatively to each of these questions. He was asked, “[D]o you understand[] that in Count II you are charged with having committed the offense of using and carrying a firearm in relation to a crime of violence?” and responded “Yes, I do.” *Id.* at 11. Fisher stated that he had read the prosecution version (Docket No. 10) and understood it. Plea Tr. at 14-15. The prosecution version states, *inter alia*, “The United States would prove that the defendant carried that firearm during the time he possessed the cocaine and that he did so in relation to his possession of the drugs.” Prosecution Version at 1-2.

II. Analysis

As the basis for his claim of ineffective assistance of counsel, Fisher asserts that his attorney “advised petitioner to plead guilty to 18 U.S.C. § 924(c).” Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket No. 16) (“Form Motion”) at 5. Under the heading “Supporting FACTS” following this statement in the motion, Fisher has written “SEE ATTACHED.” Defendant’s Motion to Correct, Set Aside or Vacate Sentence Pursuant to 28 U.S.C. § 2255 (“Typed Motion”), attached to the printed form motion, asserts that Fisher did not use the firearm in connection with the drug offense and was carrying it for unrelated reasons. Typed Motion at (1)-(3). He argues that his counsel failed to “correctly interpret[]” section 924(c) to him and should have objected to the charge. *Id.* at (4).

In response, the government points out that Fisher’s form motion, made under oath, contains no factual allegations. Instead, the defendant relies on the allegations appearing in the accompanying typed motion, a document that is executed neither under oath nor on penalty of perjury. A petition for post-conviction review “must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits. . . . Facts alluded to in an unsworn memorandum will not suffice.” *United States v. Labonte*, 70 F.3d 1396, 1413 (1st Cir. 1995) (citations omitted), *rev’d on other grounds*, 137 L.Ed.2d 1001 (1997). Fisher’s submission is insufficient to meet the requirement of a sworn set of factual allegations. This fatal flaw itself justifies denial of the defendant’s motion. In addition, the motion should be denied without an evidentiary hearing because the allegations, if properly presented, would not entitle Fisher to relief in any event.

Strickland v. Washington, 466 U.S. 668 (1984), provides the applicable standard for assessing

whether a defendant has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. The defendant must show that counsel's performance was deficient, i.e., that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the defendant must make a showing of prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. *Id.* at 697. The *Strickland* standard applies to claims of ineffective assistance of counsel raised in connection with a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985).

There is no prejudice under *Strickland* and *Hill* absent a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *LaBonte*, 70 F.3d at 1413. Fisher appears to attempt the latter course by arguing that his subjective intent with regard to the firearm was not to use it in connection with his drug trafficking. However, that is not the applicable legal test. The applicable statute, 18 U.S.C. § 924(c)(1), provides, in relevant part:

Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years

The First Circuit has required that the following elements be established in proving this crime: that the defendant "(1) committed the drug trafficking crime of possession with intent to distribute as charged in the indictment, (2) knowingly carried a firearm, and (3) did so during and in relation to the drug trafficking crime." *United States v. Manning*, 79 F.3d 212, 216 (1st Cir. 1996). Fisher's challenge addresses only the third element. Carrying the firearm contemporaneously with the drugs

that form the basis of the trafficking charge satisfies the “during” requirement. *Id.* at 217.

The “during and in relation” element of § 924(c)(1) has also certainly been met for if the drugs and gun are together in the same place it is nearly an inescapable conclusion that they satisfy the *in relation to* prong.

Wilson v. United States, 125 F.3d 1087, 1093 (7th Cir. 1997) (internal quotation marks and citation omitted) (emphasis in original); *see also Manning*, 79 F.3d at 217 (“Evidence that Manning carried the gun . . . in the same briefcase as the drugs readily satisfies the ‘in relation to’ test.”)

Here, Fisher was carrying on his person when arrested a bag of crack cocaine, a bag of powder cocaine, heroin and a gun holster. Transcript of Proceedings, Hearing on Motion for Suppression (Docket No. 12), at 18-19. Just before he was arrested, while struggling with a police officer, Fisher threw a bag of marijuana onto the railroad tracks along which he had been running. *Id.* at 20. Fisher told the arresting officers that he dropped a loaded .22 “somewhere in the tussle” with the police officer. *Id.* at 38. Fisher was carrying both the drugs and the firearm on his person at the same time. Nothing further was necessary to satisfy section 924(c)(1). Therefore, Fisher’s argument does not meet the prejudice prong of *Strickland*.

Finally, Fisher offers nothing to overcome the presumption of truthfulness that attaches to his statements at the plea hearing. *United States v. Mateo*, 950 F.2d 44, 46-47 (1st Cir. 1991); *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984). This is yet another, independent reason why he is not entitled to the relief sought by his motion.

III. Conclusion

For the foregoing reasons, I recommend that the motion to vacate, set aside or correct the

sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of December, 1997.

*David M. Cohen
United States Magistrate Judge*